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No.

In the Supreme Court of the United States

October Term, 1976

FIRST NATIONAL BANK OF FORT COLLINS,
Petitioner,

vs.

STATE OF COLORADO, *ex rel.*, STATE BANKING BOARD, and HARRY BLOOM, STATE BANK COMMISSIONER AND CHAIRMAN, STATE BANKING BOARD, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The First National Bank of Fort Collins petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit, not yet reported, is appended as Appendix A. The opinion of the District Court, reported in 394 F.Supp. 979 (Colorado, 1975) is appended as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the use of off-premises customer-bank communications terminals by customers of a national bank constitute branch banking?

2. If only certain uses of a customer-bank communications terminal constitute branch banking, are other uses of the terminal permissible?

3. To what extent are the rulings of state banking officials authorizing substantially similar activities to state banks to be considered in determining the propriety of the use of customer-bank communications terminals by national banks?

STATUTES AND RULINGS INVOLVED

Relevant portions of 12 U.S.C. §36 (the McFadden Act) are reproduced in Appendix C-1. Section 36(c) authorizes national banks to establish branch banks:

> . . .if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

Section 36(f) defines the term:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

In Appendix C-2 is reproduced the Colorado statute basically prohibiting branch banking, 1973 C.R.S. 11-6-101, and the separate statute authorizing the State Banking Board to allow any activity allowed to national banks, 1973 C.R.S. 11-2-103(e). The published Rule of the Colorado Banking Commission authorizing off-premises acceptance of items to be deposited, and off-premises delivery of cash to customers, by armored car or other messenger service, is found in Appendix C-3.

The published rule of the Comptroller of the Currency (12 C.F.R. 7.7491) authorizing national banks to utilize remote customer-bank communication terminals is contained in Appendix C-4.

STATEMENT OF THE CASE

The First National Bank (Bank) is a national bank, located in the downtown business district of Fort Collins, Colorado, population about 60,000. In compliance with the ruling of the Comptroller of the Currency (12 C.F.R. 7.7491, Customer-Bank Communication Terminals, 39 F.R. 4416, December 24, 1974) (Appendix C-4) the Bank installed an off-line non-manned terminal in a shopping center development

approximately 2.8 miles from the main bank building in downtown Fort Collins. The machine, located in an exterior wall of a brick office building, is designed as a drive-through facility to be operated by a person seated in an automobile. It is not connected with the computer center at the Bank's main office building, but operates as a self-contained unit, unmanned by any personnel.

The machine can be operated by those bank customers who have cards containing certain information encoded on a magnetic stripe. The encoded information includes a personal identification number, the customer's checking or savings account numbers and his "Master Charge" number.

To operate the machine, the customer inserts his card into a slot on the unit and taps out his personal identification number. The machine makes the identification from the previously encoded information and signals the customer to select one of the available transactions. The customer can obtain a prepackaged packet of either $25 or $50 in currency, which can be withdrawn from either a savings account or a checking account. In the alternative, the money may also be charged to his "Master Charge" account, which is a prearranged line of credit. Prior to the decision of the District Court, the customer could also place envelopes of checks or currency in the machine and, by pressing the proper button, indicate whether the checks or currency should be deposited to his checking or savings account. This function was discontinued in compliance with the ruling of the District Court.

Finally, the customer may request the transfer of funds from his savings account to his checking account, or vice versa, by pressing the appropriate buttons.

Although such machines are currently operated by savings and loan associations in Colorado, and although there are two banks which permit reciprocal use of their respective machines by the customers of the other, the First National Bank's machine is the only such remote facility being operated by a bank in Colorado.[1]

The State Banking Board brought action in the United States District Court for the District of Colorado to declare invalid the Comptroller's Ruling, and to enjoin further use of the machine, alleging a violation of Colorado's laws against branch banking. The basis of jurisdiction was 28 U.S.C. §1331 and 5 U.S.C. §702.

The District Judge examined each function of the terminal in light of the definition of "branch" in 12 U.S.C. §36(f), as to whether it constituted a "place of business" where (1) "deposits" were "received", or (2) "checks paid", or (3) "money lent", and concluded:

As to the "receipt" of "deposits":

". . .To the extent that it performs the function of receiving deposits, this machine constitutes a branch bank under Title 12 U.S.C. §36(f)." The District Judge stated that he felt compelled to this conclusion by the wording of *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337 (1969).

As to "checks paid":

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[1]Other banks use the machines, but confine their use (except for the mentioned reciprocal use) to the main banking office or to one detached facility located within 3000 feet of the main bank. One such detached facility is specifically authorized by 1973, C.R.S. 11-6-101 (Appendix C-2).

The fact that prepackaged amounts of money were obtained from the machine did not appear to the District Court to be the cashing of a check. The Judge concluded that a check is a "draft drawn on a bank payable on demand"; and that instructing the Bank by depressing keys on a machine is not the writing of such an order. Rather, he compared it to the wire transfer of funds which was never considered to be the payment of a check.

As to "money lent":

The Court likewise concluded that the machine did not lend money. The opinion observed that the customer is drawing against a line of credit which had been prearranged at the bank. The Court could see no functional difference between the use of a bank credit card in the machine and the use of the card to obtain cash, services or products from a retail trader who accepts such cards.

The District Court concluded by observing:

> It is not the proper function of this Court to decide whether it is good or bad policy to permit the use of these machines by banks.
>
> This Court shares the Comptroller's observation that it is a difficult task to apply the language of a 1927 statute to the use of an electronic technology never envisioned by those who wrote the law.
>
> In reaching these conclusions I have followed the direction of the Supreme Court of the United States, in the cases cited above, to consider the McFadden Act

> by applying the literal meaning of its language to the functions of this machine.

The Court's decree declared that the capability of the machine to receive checks and currency was the receiving of deposits, and therefore branch banking and improper; the other uses were determined to not be branch banking in violation of 12 U.S.C. §36, and therefore proper.

On appeal to the Court of Appeals for the Tenth Circuit, it was ruled that:

> The judgment insofar as it declares the receipt of deposits by the Bank's off-premises CBCT is in violation of 12 U.S.C. § 36 is affirmed. The judgment insofar as it declares the withdrawal of funds or the transfer of funds by the Bank's off-premises CBCT is not in violation of 12 U.S.C. § 36 is reversed.

The Appellate Court was of the view that the reasoning of the lower court "unduly emphasizes form at the expense of substance." "Actually," said the Court of Appeals, "it was not necessary for the trial court. . .to find that in permitting withdrawals and transfer of funds, the CBCT fit neatly and precisely into the traditional molds of 'checks paid' or 'money lent' as those terms are used in 36(f)."

On the contrary, said the Appeals Court, "accepting deposits, or paying checks, or lending money are not the only indicia of branch banking"; rather, any traditional banking business or transaction away from the main office was intended by the Act to be prohibited. It concluded: "In our view, then, the

withdrawal of funds and the transfer of funds from one account to another is a traditional banking transaction which comes well within the prohibition of the statute."

RELATED PETITIONS

Related petitions for writs of certiorari are pending before this Court. They are: *Continental Illinois National Bank and Trust Company of Chicago v. State of Illinois, et al.* (no. 75-1900); *First National Bank of Chicago v. State of Illinois, et al.* (no. 76-17); and *Robert Bloom, Acting Comptroller of the Currency v. Independent Bankers Association, et al.* (no. 76-258); and we are informed that a petition for writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in *State of Missouri, ex rel., Kostman, Commissioner of Finance v. First National Bank in St. Louis*, will soon be filed.

REASONS FOR GRANTING REVIEW

We agree with the Comptroller of the Currency of the United States that "the extent to which national banks are authorized to install and operate customer-bank communication terminals under existing federal law is perhaps the most important legal question presently confronting the banking industry."[2] It is a question made difficult of resolution because it is "a difficult task to apply the language of a 1927 statute to the use of an electronic technology never envisioned by those who wrote the law."[3]

[2]Petition for writ of certiorari filed on behalf of the Comptroller of the Currency in petition in this Court entitled *Robert Bloom, Acting Comptroller of the Currency, Petitioner v. Independent Bankers Association of America, et al., Respondents*, no. 76-258, at 8.

[3]Opinion of the United States District Judge in this case (Appendix B).

A logical argument can be made that the customer-bank communication terminal of the kind involved in this case is, or is not, a "place of business" as contemplated by the McFadden Act; and similarly logical arguments can be made on each side of the question of whether the functions of such machine make it a place (whether or not a "place of business") where deposits are made, checks are cashed, and money is lent.

Surely, however, the broad prohibition against *any* "traditional banking transaction" other than at the main office of a bank, as contemplated by the Tenth Circuit Court of Appeals, would severely cripple national banks in this part of the country. Such a conclusion seems quite contrary to the philosophy and rule announced by this Court rather clearly in *Merchants Bank v. State Bank*, 10 Wall. 604 (1871). The Court should issue an opinion in this case if for no other reason than to clarify its position and remove the cloud cast by the Tenth Circuit over long established and legitimate banking activities which may be initiated off main banking premises. It invites state attacks on time-honored and heretofore permissible practices of all national banks in these western states. Almost all national banks in other than the smallest towns conduct such off-premises banking activities as new business solicitation, the closing of loans involving multiple lenders, credit card services, banking by mail, data processing, and all types of correspondent services, for example.

Returning again to the language of U.S.C. §36(f), it is extremely desirable that this Court should announce an interpretation of the McFadden Act, and the National Banking Act in general, so that bankers may be advised, not only as to the propriety of the use of the

CBCT involved in this case, but as to the extent to which they might utilize all of the rapidly developing and innovative funds transfer concepts which promise to refashion and modernize the banking practices, and of which the unit in question is only one example. To what extent may national banks adopt new "checkless" means of operation under the supervision of the Comptroller of the Currency and the Federal Reserve Board? Or, may banks progress only to the extent authorized by state bank officials? We believe that this Court should clearly announce the rules.

In doing so, we further believe that, in applying a 1927 act to the new technology of 1976, the Court, faced with alternative and equally logical interpretations, should construe the statute so as to promote the utilization of new and innovative banking techniques, if it can be done without injury to the expression of Congressional intent. And it is our position that it can. We suggest to this Court that the restrictions of the McFadden Act should not be broadened if the effect is to ban obviously useful and demonstrably convenient devices and concepts which are not particularly and specifically covered by the terms of the Act. This is particularly true if this Court is still of the opinion that "[a]nti-branching laws. . .are now widely recognized as a simple device to protect outlying unit banks from the rigors of regional competition"[4] and that "[t]he obvious purpose and effect of a rigid antibranching law is to make the potential bank customers of suburban, small town, and rural areas a captive market for small unit banks."[5]

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[4]*United States v. Citizens and Southern Bank*, 422 U.S. 86, 95 S.Ct. 2099 (1975) at 2118 (footnote).

[5]*Id.*, at 2117.

With all of this in mind, the Court should, in addition to a general expression of views, separately discuss and decide the applicability of the McFadden Act to the separate functions of the CBCT in this case.

DEPOSITS

Both the District and Circuit Courts felt that the decision of this Court in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337 (1969), mandated a holding that the use of a depository, and the deposit button on the machine, constituted the receipt of deposits. We do not believe that this Court meant that *Plant City* should be so construed. In *Plant City*, the items taken from the depository were counted, and identified, and verified by bank employees operating out of a prohibited armored car; whereas the CBCT is totally unmanned.

Also, the situation in Colorado is quite different from that which existed in Florida at that time. Florida considered the use of armored cars to be branch banking—Colorado permits it. Rules of the Colorado State Banking Commission provide:

> **Messenger service.**—State banks may provide messenger service to customers by means of an armored car or otherwise, and such activity shall not constitute the practice of branch banking provided it is conducted strictly in accordance with this Regulation.
>
> (a) **Agreement.**—Messenger service permitted herein may only be provided pursuant to an express bona fide agreement wherein it is specified that the messenger is the agent of the customer

> rather than an agent of the bank. Deposits collected under such messenger arrangement shall not be considered as having been received by the bank until they are actually received by a teller at the bank's premises. A check is to be considered as having been paid at the bank when the money is delivered to the messenger as agent for the customer.

Thus, if the deposit function of the machine is arguably "branch banking" as federally defined, it is nevertheless permissible to national banks in Colorado because similar off-premises receipt of deposits by state banks is allowed, under conditions and concepts not in our mind distinguishable to use of the CBCT.

To us, the state regulation authorizes state banks to engage in the activity held in the *Plant City* case to be "branch banking." The use of the CBCT by the First National Bank, for its "depository" function, does not place any Colorado state bank in a disadvantageous position. Should there be any doubt as to the applicability of the Colorado Banking Commission Rule to off-premises CBCTs, the Commission is specifically empowered by Colorado statutes (Appendix C-2) to issue a clarifying rule specifically authorizing the operation of CBCTs in the same manner as other mobile and remote terminals.

FUNDS TRANSFERS

As regards the question as to whether or not money is lent or checks paid at a CBCT, the Circuit Court's assumption that *Plant City* requires or suggests that the dispensing of cash is a prohibited function seems

unwarranted. As we read *Plant City*, the condemned activity was the actual cashing of checks by bank employees in the armored car. "A more detailed examination of the services shows that customers. . . could. . .arrange to have the armored car. . .bring cash to them in exchange for checks delivered to the armored car teller." (*Plant City, supra.*, 90 S.Ct., at 340)

In purported reliance on *Plant City*, the Circuit Court concluded that the withdrawal of funds and the transfer of funds is a "traditional banking transaction which comes well within the prohibition of the statute." This is true only if it is assumed that all traditional banking transactions, whether or not defined in the statute, are equally prohibited. As the District Court observed, no "check" is involved, certainly not in any sense of the word that could have been contemplated by the drafters of the McFadden Act. As the District Court correctly observed, "[t]o instruct the bank by depressing the keys on this Docutel machine is not the writing of an order for the BANK to pay upon demand." The function of the machine has nothing to do with checks, insofar as any common and understood definition of the term is utilized. The use of the machine is merely an extension of the common and analogous telephone and mail request for withdrawals, clearinghouse procedures, computer instructed debits and credits to meet payrolls, and other common and now accepted transactions which are an integral part of the banking system.

Similarly, the machine is something other than a place of business where money is "lent." The machine is not a loan office. The machine cannot be used except to the extent that its use is authorized by prearrangement between the customer and the bank, made at the main office prior to the issuance of the customer's card.

The machine does not lend money; it merely disgorges it.

We respectfully suggest that the Court of Appeals has given a narrow, unjustified, and extremely restrictive interpretation to 12 U.S.C. §36(f); that it has done so, in part, because it has misinterpreted this Court's ruling in *First National Bank in Plant City v. Dickinson*; and that if the rule as announced by the Court of Appeals should remain as the rule of law in the Tenth Circuit, it will effectively preclude the national banks of that circuit from utilizing many of the new techniques which are rapidly developing, and the adoption of which are essential to such banks' continued functioning and survival.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 57-1523, 75-1611, 75-1612

STATE OF COLORADO, ex rel., STATE BANKING BOARD, and HARRY BLOOM, STATE BANK COMMISSIONER and CHAIRMAN, STATE BANKING BOARD,

Plaintiffs-Appellants and Cross-Appellees,

v.

FIRST NATIONAL BANK OF FORT COLLINS, and JAMES E. SMITH, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES,

Defendants-Appellees and Cross-Appellants.

and

THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE

Appeal from the United States District Court for the District of Colorado
(D.C. Civ.A, 75-M-397)

Before BREITENSTEIN, McWILLIAMS, and DOYLE, *Circuit Judges.*

McWILLIAMS, *Circuit Judge.*

This appeal concerns the efforts of the First National Bank of Fort Collins, Colorado to install an electronic banking facility, commonly known as a customer-bank communications terminal (CBCT), in a regional shopping center situate approximately two miles from its main bank building located in downtown Fort Collins. This CBCT permits the Bank's customers, through the use of a coded card, to transact any of the following: (1) deposit funds to the customer's account by placing checks or currency in an envelope and inserting the envelope into a slot in the face of the machine, tapping out the amount of the deposit on the face of the machine and pressing a button to indicate whether the deposit is to be credited to a checking or savings account; (2) withdrawing a prepackaged packet of either $25 or $50 in currency from the machine and debiting such withdrawal to either the customer's checking or savings account, or charging it to a Master Charge Account or a Balance Plus Account; or (3) transferring funds from the customer's savings account to his checking account, or vice versa. See the trial court's memorandum opinion and order for a detailed statement as to the manner in which a CBCT functions. Colorado *ex rel.* State Bank Board v. First National Bank, 394 F.Supp. 979 (D. Colo. 1975).

The first *(sic)* National Bank of Fort Collins, hereinafter called the Bank, is a national bank. On December 12, 1974, the Comptroller of Currency issued an interpretative ruling which allowed national banks to make available to their customers one or more CBCT's. In his ruling the Comptroller declared that the use of such devices at locations other than the main office did not constitute branch banking. Acting pursuant to the ruling of the Comptroller, the Bank, as

above indicated, installed a CBCT in a shopping center two miles away from its offices in downtown Fort Collins.

The State of Colorado expressly prohibits branch banking, with the exception that, subject to certain conditions, a bank may maintain one detached facility within 3,000 feet of its premises. C.R.S. 1973, 11-6-101(1). The State of Colorado, acting through the State Board of Banking, determined, to its satisfaction, that the CBCT installed and operated by the Bank in the shopping center two miles removed from its main office was a branch bank and prohibited under both federal and state law.

It was in this general setting that the State of Colorado, *ex rel.* State Banking Board, brought the present proceeding against both the Bank and the Comptroller. The gravamen of the complaint was that the Bank was engaging in branch banking in violation of federal and state law and sought declaratory judgment and permanent injunction. A hearing on a preliminary injunction was by agreement treated as the hearing on permanent injunction.

The trial court concluded that the use of the Bank's CBCT for receiving deposits constituted branch banking in violation of 12 U.S.C. § 36, but that the other functions of the CBCT did not constitute branch banking and were valid under the Comptroller's interpretative ruling. Upon the Bank's assurances that it would follow the trial court's declaratory judgment without the necessity for an injunction, the trial court granted no injunctive relief.

The State Banking Board now appeals the judgment of the trial court that the withdrawal of

money and the transfer of funds from a savings account to a checking account through the use of the CBCT does not constitute branch banking. The Bank and the Comptroller by cross-appeal challenge that part of the trial court's judgment which declared that the receipt of deposits by the CBCT violated the federal statute regarding branch banking.

The Comptroller, but not the Bank, challenges the standing of the plaintiffs to maintain the present proceeding. The trial court concluded that the plaintiffs did have standing to seek declaratory judgment, citing United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); and Jackson v. First National Bank of Valdosta, 349 F.2d 71 (5th Cir. 1965). We agree that these plaintiffs have standing.

We also agree with the conclusion of the trial court that the off-premises CBCT, insofar as it receives deposits, constitutes branch banking in violation of 12 U.S.C. § 36. In this regard we, like the trial court, find the instant case to be controlled by First National Bank in Plant City v. Dickinson, 396 U.S. 122 (1969). In accord, *see* Independent Bankers Association v. Smith, 534 F.2d 921 (D.C. Cir. 1976); Illinois *ex rel.* Lignoul v. Continental Illinois National Bank and Trust Co., No. 75 C-2027 (7th Cir., May 27, 1976), *Petition for cert. filed*, 45 U.S.L.W. 3005 (U.S. June 30, 1976) (No. 75-1900); and Missouri *ex rel.* Kostman v. First National Bank, No. 76-1056 (8th Cir., July 20, 1976).

As indicated, the trial court additionally concluded that as concerns withdrawals and transfers, the Bank's off-premises CBCT was not acting as a branch bank,

and that such did not offend 12 U.S.C. § 36. With this conclusion we are not in accord.

Since the trial court entered its judgment in the instant case, two Circuits have considered this precise matter, i.e., whether the withdrawal of funds from either a checking account or a savings account, or the transfer of funds from one to the other, through the use of an off-premises CBCT is in violation of the federal rule on branch banking. Both Circuits held that such is in violation of 12 U.S.C. § 36. We agree with the result reached by those Circuits. We feel no need to here elaborate on the matter. It is sufficient to say that we subscribe to Independent Bankers Association v. Smith, 534 F.2d 921 (D.C. Cir. 1976) and Illinois *ex rel.* Lignoul v. Continental Illinois National Bank and Trust Co., No. 75 C-2027 (7th Cir., May 27, 1976), *petition for cert. filed*, 45 U.S.L.W. 3005 (U.S. June 30, 1976) (No. 75-1900).

The reasoning of the trial court in the instant case was that the *manner* in which Bank's CBCT permitted the withdrawal of prepackaged packets of money, with a corresponding debit to the customer's checking or savings account, and also permitted the transfer of funds from one account to another, did not constitute "checks paid" or "money lent" as those terms are used in 12 U.S.C. § 36(f). Such reasoning in our view unduly emphasizes form at the expense of substance and fails to follow the admonition of the Supreme Court in *Dickinson* that "§ 36(f) must not be given a restrictive meaning that would frustrate the congressional intent this Court found to be plain in Walker Bank [First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252]." The congressional intent referred to in *Walker Bank* was to place national and state banks in a position of "competitive equality" insofar as branch

banking is concerned.

Actually, in our view it was not necessary for the trial court in the instant case to find that in permitting withdrawals and transfer of funds, the CBCT fit neatly and precisely into the traditional molds of "checks paid" or "money lent" as those terms are used in 36(f). That section declares that the term "branch" shall *include* any branch place of business where deposits are received or checks paid, or money lent. In this regard the Supreme Court in *Dickinson* commented as follows:

> Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

In line with the foregoing, then, accepting deposits, or paying checks, or lending money are not the only indicia of branch banking. The typical bank of the present time provides many other services. In this general regard the Supreme Court in *Dickinson* in a footnote at 396 U.S. 134, n.8, quoted the following statement of Representative McFadden concerning the definitional section of the Act:

> Any place outside of or away from the main office where the bank carries on its

> business of receiving deposits, paying checks, lending money, *or transacting any business carried on at the main office*, is a branch. (Emphasis added.)

In our view, then, the withdrawal of funds and the transfer of funds from one account to another is a traditional banking transaction which comes well within the prohibition of the statute. And such, we believe, is true regardless of the particular technique used to accomplish the withdrawal or transfer.

Our holding here is in complete accord with the rationale of First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252 (1966). There, as above mentioned, the Supreme Court held that the congressional intent behind the provisions of 12 U.S.C. § 36 was to place national and state banks on a basis of "competitive equality" as far as branch banking is concerned. Colorado law on branch banking precludes a state bank from maintaining off premises a machine of the type here sought to be used by the Bank. Accordingly, as concerns the use of off-premises CBCT's, we are by this opinion maintaining competitive equality in Colorado.

There is the suggestion that this is a form of customer service which is to the best interest of the banking public. Such may well be the case. However, this argument should be addressed to the legislative branch of government. The judiciary must apply the statutory law as it has been enacted.

The judgment insofar as it declares the receipt of deposits by the Bank's off-premises CBCT is in violation of 12 U.S.C. § 36 is affirmed. The judgment insofar as it declares the withdrawal of funds or the

transfer of funds by the Bank's off-premises CBCT is not in violation of 12 U.S.C. § 36 is reversed. The case is remanded for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 75-M-397

STATE OF COLORADO, *ex rel.*, STATE BANKING BOARD, and HARRY BLOOM, State Bank Commissioner and Chairman, State Banking Board,
Plaintiffs,

v.

FIRST NATIONAL BANK OF FORT COLLINS, and JAMES E. SMITH, Comptroller of the Currency of the United States,
Defendants.

MEMORANDUM OPINION AND ORDER

MATSCH, Judge

This is an action by the State of Colorado on the relation of its State Banking Board and State Bank Commissioner for a declaratory judgment and permanent injunction. Plaintiff claims that defendant First National Bank, Fort Collins, is conducting branch banking operations contrary to both Federal and Colorado law at its 3000 South College location, and the defendant Comptroller's interpretive ruling, which authorizes this activity, is invalid. A motion for preliminary injunction was heard on April 30 and May 1, 1975. All parties were represented at that hearing and evidence was received. At the conclusion of the hearing counsel agreed that there would be no other evidence at a trial on the merits except for the possible offer by the Comptroller of some additional evidence concerning existing practices of state banks in Colorado. With that reservation the case is ready for determination on the merits.

THE FACTS

First National Bank, Fort Collins, Colorado ("BANK") is a national bank located at 205 West Oak Street in the downtown business district of Fort Collins, Colorado. On December 12, 1974, the Comptroller of the Currency issued an interpretive ruling, 12 C.F.R. 7.7491, Customer-Bank Communication Terminals (39 F.R. 44416, Dec. 24, 1974). Pursuant to that ruling and after giving the notice required by it, the BANK has installed a customer service machine in addition to two previously installed machines. One of these is located in the main bank building on Oak Street. Another is on Laurel Street, within 3000 feet of the main bank building and within the requirements of a permitted "detached facility" under Colorado law. The machine which is the subject of this suit is located in a shopping center development at 3000 South College Avenue, approximately 2.8 miles from the main bank building on Oak Street.

All three of these machines are operated under the registered trade name "First 24 Hour Bank". The College Avenue machine is located in the exterior wall of a brick office building and is designed as a drive-through facility to be operated by a person seated in an automobile.

This machine is manufactured by Docutel Corporation. The machine is not connected with the computer center at the BANK'S main office building and the machine operates electrically as a self-contained unit, unmanned by any personnel.

The machine can be operated only by those bank customers who have cards which have been encoded

with certain information on a magnetic stripe. The cards used may be either a "Master Charge" Card or a "First 24 Card" issued by the BANK. The encoded information consists of a six digit personal identification number, the customer's checking account or savings account number, his "Master Charge" number, the number of withdrawals permitted to him each day and the expiration date of the card.

To operate the machine the customer inserts his card into a slot on the unit and taps out his personal identification number. The machine makes the identification from the previously encoded information and signals the customer to select one of the available transactions. If identification is not made the card is retained in the machine and no transaction can be accomplished.

The customer can obtain a prepackaged packet of either $25.00 or $50.00 in currency out of the machine. That money may be withdrawn from either a savings account or a checking account. It may be charged to a "Master Charge" account or to a "Balance Plus" account, the latter being a name given to a prearranged line of credit as an adjunct to the customer's checking account with the BANK.

The fact that a withdrawal has been made or that an advance of funds has been made against the line of credit or the "Master Charge" account is recorded by the machine which also records that use on the customer's card, thereby controlling the frequency of withdrawals.

The customer may deposit funds in the form of checks or currency by placing those items in an envelope and inserting it into a slot in the face of the

machine, tapping out the amount on numbered keys and pressing a button to indicate whether the deposit is to be credited to a checking or savings account. The deposit is recorded by the machine.

The customer may also transfer credit from a savings account into his checking account or vice versa by pressing the appropriate buttons. Again the transaction is recorded by the machine.

The machine contains pre-printed transaction forms on which the machine prints coded information identifying the machine number, the customer's account number, the type of transaction, the amount of the transaction, the time of day of the transaction, a sequence number and other data. The machine issues a copy of this transaction form to the customer and another copy is retained within the machine.

At the beginning of each banking day, two persons open the unit, replenish the cash supply, collect the transaction forms and pick up the envelopes containing the checks or currency deposited. The transaction forms and deposit envelopes are then taken to the main office of the BANK at 205 West Oak Street for verification and processing into computer readable characters for forwarding to the computer center. There the transactions are posted to the appropriate accounts. Accordingly, the transactions occurring on a given day are not entered into the customer account records of the BANK until the following day. The transaction forms used all bear the printed inscription "all transactions are subject to proof and verification."

At the time of the hearing this machine on College Avenue was the only such machine being used by a

state or national bank in Colorado at a location other than the main bank building or within the 3000 foot radius authorized for a single detached facility under Colorado law.[1] There are several such machines currently operated by savings and loan associations in Colorado. These machines have received favorable acceptance from the BANK'S customers.

It is a common practice for both state and national banks in Colorado to receive deposits from customers by mail, using envelopes and transaction forms provided by the banks for that purpose. It is also common for commercial customers of Colorado banks to transfer funds between accounts in different banks through communications by wire or telephone. These transfers may be accomplished by crediting the correspondent balance of the receiving bank and debiting the correspondent balance of the transferring bank without any other documentation. Another common practice for banks in this state is the extension of a line of credit to a commercial customer who signs a master note for the full amount to be borrowed but who then controls the credit costs by requesting the actual advance of funds to be made by credits to his checking account as needed. Those requests are frequently made by telephone on a daily basis.

THE LAW

Title 12 U.S.C. § 36(c), in relevant parts, provides as follows:

> A national banking association may, with the approval of the Comptroller of the

[1]There are two banks which permit reciprocal use of their respective machines by each other's customers.

> Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .

Title 12 U.S.C. § 36(f) provides:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

The State of Colorado prohibits branch banking by statute. C.R.S. 1973 §11-6-101(1) provides:

> Every bank shall be conducted at a single place of business, and no branch thereof shall be maintained elsewhere; but any bank, upon application to and approval by the banking board, may operate one detached facility, only if the detached

> facility is located within three thousand feet of the nearest point on the boundary of the premises of the bank's place of business and is not located within three hundred feet of the boundary of the premises of another bank or another bank's detached facility, unless the other bank consents to a closer location. The board shall give written notice of every application to each bank located within a three-mile radius of the applicant bank and may, in its discretion, order a public hearing with respect thereto. Approval shall be granted by the board only upon a showing of need. Banking activities at such detached facility shall be restricted to receiving deposits, issuing money orders, cashiers' checks, and travelers' checks or similar instruments, cashing checks or drafts, making change, receiving note payments, receiving or delivering cash and instruments and securities, and disbursing loan proceeds by machine. Any other facility, agency, or paying or receiving station operated by any bank or agent shall constitute a branch within the meaning of this section. Any facility authorized by the United States treasury department shall not be subject to the limitations of this section.

In deciding *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966), the Supreme Court reviewed the legislative history of Section 36 and concluded:

> . . .that Congress intended to place national and state banks on a basis of

> "competitive equality" insofar as branch banking was concerned. (p. 261)

In *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969) the Supreme Court determined that the definition of branch banking in § 36(f) included an armored car messenger service and an off-premises receptacle for packages containing cash or checks for deposit. With respect to the depository the Court rejected the argument that the deposits could not be considered to be made until they had been taken to the bank and verified by saying:

> . . .Unquestionably, a competitive advantage accrues to a bank that provides the service of receiving money for deposit at a place away from its main office; the convenience to the customer is unrelated to whether the relationship of debtor and creditor is established at the moment of receipt or somewhat later. (p. 137)

CONCLUSIONS

Jurisdiction over this controversy is found in 28 U.S.C. § 1331 and 5 U.S.C. § 702.

The interest of state administrative officials in enforcing branch banking prohibitions to maintain competitive equality between state and national banks has been held sufficient to confer standing to challenge the actions of the Comptroller of the Currency. *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967); *Jackson v. First National Bank of Valdosta*, 349 F.2d 71 (5th Cir. 1965). Since those decisions the Supreme Court of the United States has determined that standing to review agency action does not require a showing of substantial injury and that a question of principle may be litigated.

United States v. SCRAP, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972) and *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). The plaintiffs therefore do have standing to seek a declaratory judgment in this civil action.

The Comptroller has contended that the plaintiffs failed to exhaust administrative remedies because they did not participate in the administrative process leading to the questioned interpretive ruling. There is no merit in that argument because that ruling was issued without a hearing. While a later hearing was held in April, 1975, the original ruling of December 12, 1974 is the final agency action subject to judicial review under 5 U.S.C. § 704. Moreover, the transcript of the April 2, 1975 hearing shows that an officer of a national bank in Colorado did appear and did present testimony concerning the installation of the machine in Fort Collins. (Transcript of proceedings, April 3, 1975, pp 434-436).

The first question to be answered in this case is whether the machine installed in the wall of the building at 3000 South College Avenue is a place at which deposits are received. Because I can see no functional difference between the way in which a customer makes a deposit in this machine and the stationary receptacle for deposits which was the subject of the decision in *First National Bank in Plant City v. Dickinson, supra*, I am compelled to conclude that it is such a place. Accordingly, to the extent that it performs the function of receiving deposits, this machine constitutes a branch bank under Title 12 U.S.C. § 36(f). Because the BANK already has a detached facility, and because this machine is beyond the geographical limit of a permitted detached facility,

the machine is not authorized by Colorado law. Therefore, to the extent of this single function the machine is prohibited branch banking. The transfer of funds between accounts of the bank customer is not a deposit.

The next question is whether this machine is a place at which checks are paid. I conclude that it is not. The word "check" is defined in *Webster's Third New International Dictionary*, Unabridged, 1968, as "A written order directing a bank or banker to pay money as therein stated: . . ." The definition given to "check" in the Uniform Commercial Code is ". . .a draft drawn on a bank and payable on demand". C.R.S. 1973 § 4-3-104(2).

There is an obvious similarity between the customer's use of this machine to obtain a packet of $25.00 with a corresponding debit to his checking account balance and the drawing of a check payable to cash or to himself with the presentation of that check for payment by the drawee bank at a teller station. This sameness in result, however, is not controlling. What is different in the transaction is the means by which the customer communicates with the bank. To instruct the bank by depressing the keys on this Docutel machine is not the writing of an order for the BANK to pay upon demand. It is comparable to the wire transfer of funds by commercial customers, and that is not considered to be the payment of a check.

The third question is whether the subject machine is a place at which there is "money lent". I conclude that it is not. Whether the customer obtains the prepackaged currency as a charge against his "Master Charge" account or his "Balance Plus" account, he is drawing against a prearranged line of credit. There is no apparent functional difference between this use of a

bank credit card and the use of such a card to obtain cash, services, or products from a retail trader who accepts such cards. To conclude that this function of the machine is branch banking would therefore require the conclusion that any such use of bank credit cards is also branch banking.

In the statement of explanation accompanying his interpretive ruling, the Comptroller set forth clearly and cogently his reasons for believing that approval of the operation of customer-bank communication terminals by national banks is sound public policy. It is not the proper function of this Court to decide whether it is good or bad policy to permit the use of these machines by banks.

This Court shares the Comptroller's observation that it is a difficult task to apply the language of a 1927 statute to the use of an electronic technology never envisioned by those who wrote the law.

In reaching these conclusions I have followed the direction of the Supreme Court of the United States, in the cases cited above, to consider the McFadden Act by applying the literal meaning of its language to the functions of this machine. The Comptroller of the Currency has no authority to do otherwise. Accordingly, to the extent that his interpretive ruling permits the use of this machine to receive deposits, it is erroneous and the permission given to the defendant BANK to make that use of the machine is invalid.

During the presentation of arguments in this case, counsel for the BANK assured this Court that a declaratory judgment would be followed by the BANK without any necessity for an injunction. Accordingly, there is no need to determine whether the evidence

would support a finding of immediate and irreparable injury. Additionally, because the use of this machine to receive deposits has not been expressly authorized for state banks by the State of Colorado, it would be irrelevant and immaterial to receive any additional evidence on the question of banking practices in Colorado as suggested by the Comptroller. There is, therefore, no need for any further hearing in this case.

Upon the foregoing, it is

ORDERED and ADJUDGED that the use of the bank machine at 3000 South College Avenue, in Fort Collins, Colorado, by the First National Bank for the receipt of deposits is branch banking in violation of Title 12, U.S.C. § 36(f) and that to the extent such use is permitted by the interpretive ruling of the defendant Comptroller of the Currency, that ruling is invalid. The other functions of this machine do not constitute branch banking and the permission given by the Comptroller pursuant to his interpretive ruling for those functions is valid.

Done at Denver, Colorado, this 28th day of May, 1975.

BY THE COURT:

Richard P. Matsch, *Judge*
United States District Court

APPENDIX C

STATUTES AND RULES INVOLVED

APPENDIX C-1
FEDERAL STATUTES:

The definition of "branch" in the McFadden Act, as amended, 12 U.S.C. § 36(f):

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

The limitations on "branches" of national banks in the McFadden Act, as amended, included in 12 U.S.C. § 36(c):

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

APPENDIX C-2
COLORADO STATUTES:

1973 Colorado Statutes Annotated
Section 11-6-101

(1) Every bank shall be conducted at a single place of business, and no branch thereof shall be maintained elsewhere; but any bank, upon application to and approval by the banking board, may operate one detached facility, only if the detached facility is located within three thousand feet of the nearest point on the boundary of the premises of the bank's place of business and is not located within three hundred feet of the boundary of the premises of another bank or another bank's detached facility, unless the other bank consents to a closer location. The board shall give written notice of every application to each bank located within a three-mile radius of the applicant bank and may, in its discretion, order a public hearing with respect thereto. Approval shall be granted by the board only upon a showing of need. Banking activities at such detached facility shall be restricted to receiving deposits, issuing money orders, cashiers' checks, and travelers' checks or similar instruments, cashing checks or drafts, making change, receiving note payments, receiving or delivering cash and instruments and securities, and disbursing loan proceeds by machine. Any other facility, agency, or paying or receiving station operated by any bank or agent shall constitute a branch within the meaning of this section. Any facility authorized by the United States treasury department shall not be subject to the limitations of this section.

Section 11-2-103(1)(e)

(1) In addition to other powers conferred by this code, the banking board has power to: . . .(e) Authorize state banks to engage in any banking activity in which such banks could engage were they operating as national banks at the time such authority is granted, notwithstanding any restriction elsewhere contained in this code; . . .

APPENDIX C-3
RULES OF COLORADO STATE BANKING COMMISSION
3-1.1

Messenger service. - State banks may provide messenger service to customers by means of an armored car or otherwise, and such activity shall not constitute the practice of branch banking provided it is conducted strictly in accordance with this Regulation.

(a) **Agreement.** - Messenger service permitted herein may only be provided pursuant to an express bona fide agreement wherein it is specified that the messenger is the agent of the customer rather than an agent of the bank. Deposits collected under such messenger arrangement shall not be considered as having been received by the bank until they are actually received by a teller at the bank's premises. A check is to be considered as having been paid at the bank when the money is delivered to the messenger as agent for the customer.

APPENDIX C-4
12 C.F.R. 7.7491

§ 7.7491 Customer-Bank Communication Terminals.

(a) A national bank may receive and act upon communications from its customers transmitted through electronic devices or machines requesting the withdrawal of funds either from the customer's deposit account or from a previously authorized line of credit, or instructing the bank to receive funds or to transfer funds for the customer's benefit. The device or machine may be established and operated by the bank, by the customer, or by a third party. In accordance with the customer's request or instruction and subject to verification by the bank, cash or checks may be received and cash may be dispensed at the location of the device or machine. The device or machine may not be staffed by a bank employee, except that the bank for a reasonable period of time may provide an employee to instruct and assist customers in the operation of the device or machine. Any transactions initiated by such a device or machine shall be subject to verification by the bank either by direct wire transmission or otherwise. A bank may provide insurance protection under its bonding program for transactions involving such a device or machine.

(d) A device or machine established and used in accordance with this section at a location other than the main office or a branch office of a national bank does not, in the opinion of the Comptroller, constitute a "branch" within the meaning of 12 U.S.C. 36(f).